COMPARISON OF THE UNIFORM PRINCIPAL AND INCOME ACT AND THE ARKANSAS UNIFORM PRINCIPAL AND ACT

Arkansas enacted the Uniform Principal Income Act (1997) ("UPIA") effective January 1. 2000. *See* Arkansas Code Annotated Sections 28-70-101 to 28-70-606. Arkansas adopted the 2008 Amendments to the UPIA in 2011. The UPIA with amendments has been enacted by Arkansas with only the following differences:

(1) Section 28-70-104 - Trustees Power to Adjust: The word "surviving" has been inserted before "spouse".

(2) Section 28-70-105 - Judicial Control of Discretionary Power: Arkansas did not adopt this provision of the UPIA.

(3) Section 28-70-414 - Derivatives and Options: Arkansas has substituted the following italicized language:

> "*To the extent that a trustee accounts for transaction in derivatives pursuant to this section*, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions."

for the following italicized language in the UPIA:

> "*To the extent that a trustee does not account under Section 403 for transactions in derivatives*, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions."

[Note: Section 403 of the UPIA addresses allocation made by a trustee with respect to business and similar other activities.]

(4) Section 28-70-606 - Transitional Matters: Section 28-70-606 provides that Section 28-70-409 applies to a trust described in Section 28-70-409(d) on and after the following dates:

(a) If the trust is not funded as of July 27, 2011, the date of the decedent's death.
(b) If the trust is initially funded in the calendar year beginning January 1, 2011, the date of the decedent's death.
(c) If the trust is not described in paragraph (a) or (b), January 1, 2012.

[Note: Section 409 of the UPIA addresses deferred compensation, annuities and similar items.]

Arkansas Code Annotated Section 28-70-605 is entitled "Application of Chapter to Existing Trusts and Estates". It reads as follows:

> “This chapter [the UPIA] applies to every trust or decedent's estate existing on January 1, 2000 *except as otherwise expressly provided in the will or terms of the trust* or in this chapter.” [Emphasis added]

When a Will or trust incorporates by reference the fiduciary powers set forth in Arkansas Code Annotated Sections 28-69-301 to 28-69-305 without further drafting attention, then “power “(25)” (Arkansas Code Annotated Section 28-69-304(25)) is incorporated into the terms of the Will or trust and the incorporated introduction to the powers and this incorporated power will read as follows:

> “Without diminution or restriction of the powers vested in him or her by law, or elsewhere in this instrument, and subject to all other provisions of this instrument, the fiduciary, without the necessity of procuring any judicial authorization therefor, or approval thereof, shall be vested with, and *in the application of his or her best judgment and discretion* in behalf of the beneficiaries of this instrument shall be authorized to exercise, the powers hereunder specifically enumerated:
>
> *   *   *   *   *
>
> (25) To allocate items of receipts or disbursements to either corpus or income of the estate, as the fiduciary *in the exercise of his or her best judgment and discretion* deems to be proper, without thereby doing violence to clearly established and generally recognized principles of accounting; . . .” [Emphisis added]

This incorporation by reference appears at first glance to remove the application of the Arkansas UPIA to the Will or trust administration.

Having noted this observation about the Arkansas incorporation of fiduciary powers statute, the Arkansas UPIA does address the general principles of the exercise of fiduciary discretionary powers of administration, which the allocation of receipts and disbursements without doing violence to clearly established and generally recognized principles of accounting [Comment: what ever that might be] in the best judgment and discretion of the fiduciary would seem to be. Arkansas Code Annotated Section 28-70-103 provides as follows:

> “28-70-103 - Fiduciary Duties - General Principles:
>
> (a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Section 28-70-201 *et seq*. and Section 28-70-301 *et seq*., a fiduciary:
>
> (1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;
>
> (2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, *even if the exercise of the power produces a result different from a result required or permitted by this chapter*;

(3) shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under Section 28-70-104(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. *A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.* [Emphasis added]

Therefore, while a fiduciary may not need to, or be required to, look to the reciept and allocation directions of the Arkansas UPIA when the Arkansas statutory fiduciary powers are incorporated *without any other limiting or directed language* in the Will or trust, the fiduciary may in day to day administration be led to conclude that applying the principles of the Arkansas UPIA to the allocations of receipts or disbursements to income or principal *"in the exercise of his or her best judgment and discretion"* is advisable due to the presumption that these allocations are fair and reasonable to all beneficiaries.

ARKANSAS TRANSFER TAX

Arkansas does not currently have any type of transfer tax, gift, estate or generation skipping transfer tax. Arkansas was a "federal credit tax" state. Arkansas Code Annotated Section 26-59-103 of the "Estate Tax Law of Arkansas" reads as follows:

> "Section 26-59-103. Chapter to Remain in effect while Federal Government Imposes Estate Tax. This chapter [Estate Tax Law of Arkansas] shall remain in force and effect so long as the United States Government retains in full force and effect, as a part of the revenue laws of the United States, the present federal estate tax, and this chapter shall cease to be operative when the federal credit for state death taxes set forth in 26 U.S.C. Section 2011 is repealed completely for the estates of decedents dying on or after January 1, 2005."

If the Federal government were to reinstate the credit for state estate taxes, the Arkansas legislature would have to enact a new statute to impose the estate tax again due to the wording of the statute above and the limitations on revenue acts in the Arkansas Constitution.

Interest on Underpayments and Overpayments in Arkansas

Underpayments. Interest at the rate of 10% per year is collected on the total tax deficiency from the due date of the return until the date of payment. Arkansas Code Annotated Section 26-18-508.

If the Director of the Arkansas Department of Finance and Administration has granted an extension to pay the tax, the unpaid tax bears interest at 10% per annum from the date originally due until paid. Arkansas Code Annotated Section 26-18-505(c).

Waiver of interest. The Director may waive or remit the interest or penalty, or any portion of the interest or penalty, if the failure to pay is satisfactorily explained, or if it results from a mistake by the taxpayer of either law or facts, or the inability to pay the interest or the penalty results from the insolvency or bankruptcy of the taxpayer. Arkansas Code Annotated Section 26-18-705(b).

Overpayments. Overpayments of tax are refunded, together with interest at the rate of 10% per year. Before 2005, interest is paid from the date the return was due until a date determined by the Director that precedes the date of the refund warrant by not more than 30 days. No interest is paid on refunds made within 90 days after the last date provided for filing the return for the tax together with any extension of time for filing the return. Arkansas Code Annotated Section 26-18-508.

Interest on overpayments will be paid from the date the return was due, or the date the return is actually filed, whichever is later, until a date determined by the Director that precedes the date of the refund warrant by not more than 30 days. Arkansas Code Annotated Section 26-18-508(4). No interest will be allowed on any on an overpayment that has been refunded within 90 days of the last date for filing the return (including extensions), or 90 days after the return if filed, whichever is later. Arkansas Code Annotated Section 26-18-508(5).

[Above taken from RIA Checkpoint Arkansas State Tax Reporter Paragraph 65,530.]